

Volume 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

UNITED STATES OF AMERICA ex rel.)	
JOHN C. PRATHER, et al.,)	
)	
Plaintiff-Relator,)	
)	
VS.)	NO. C 09-2457 CRB
)	
AT&T, INC., et al.,)	
)	San Francisco, California
Defendants.)	Friday
)	April 20, 2012
)	10:46 a.m.

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued, next page)

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Official Reporter, U.S. District Court

1 **FRIDAY, APRIL 20, 2012**

10:46 A.M.

2 **P R O C E E D I N G S**

3 **THE CLERK:** Calling Civil Case 09-2457, John Prather
4 versus AT&T, Incorporated. Counsel, please state your
5 appearances for the Record.

6 **MR. BALESTRIERE:** John Balestriere for Plaintiff
7 Prather and the United States, and several states. My
8 Co-counsel, Dave Miclean, is here.

9 Good morning, Your Honor.

10 **THE COURT:** Good morning.

11 **MR. AXEL:** Good morning, Your Honor. Douglas Axel on
12 behalf of AT&T.

13 **MR. BLAVIN:** Good morning, Your Honor, Jonathan
14 Blavin on behalf of Defendant Cellco Partnership, d/b/a Verizon
15 Wireless.

16 **MS. MYLES:** Good morning, Your Honor. Kristin Myles
17 of Munger Tolles and Olson on behalf of Verizon Wireless.

18 **MR. BARNIDGE:** Good morning, Your Honor. Ed
19 Barnidge, Williams & Connolly, on behalf of Sprint Nextel.

20 **THE COURT:** Excuse me. Are you standing there,
21 drinking something?

22 **MR. BLAVIN:** Oh, sorry. It's just a glass of water,
23 Your Honor.

24 **THE COURT:** Well, put it down. I mean, it's okay,
25 but it's not really -- you're in court now.

1 (Request complied with by Mr. Blavin)

2 **MR. TAYLOR:** Good morning, Your Honor. David Taylor
3 behalf of Sprint Nextel Corporation and Qwest Communications
4 International.

5 **MS. WEBB:** Good morning, Your Honor. Shelley Webb of
6 Williams & Connolly, on behalf of Defendant Sprint Nextel.

7 **THE COURT:** That's all right. Don't take it too
8 personally.

9 **MR. BLAVIN:** I won't. I apologize again, Your Honor.

10 **THE COURT:** Well, take it personally enough, but
11 don't -- it's okay. It's -- a lot of things have happened,
12 much worse than that. I mean, go ahead.

13 **MR. BALESTRIERE:** I'm Plaintiff, Your Honor, so I'm
14 not sure if you want to hear from the Defendants first, or if
15 you want to hear our position.

16 **THE COURT:** No, I want to tell you what I'm
17 interested in. I'm interested in the lawsuit. That's probably
18 the good news and the bad news.

19 But, here's what I'm trying to figure out. I'm
20 trying to figure out whether the Plaintiff qualifies to bring
21 this lawsuit. Specifically, whether he voluntarily disclosed
22 the information and was the original source. And I have a
23 number of concerns about that, and let me sort of articulate
24 them, to the extent I'm able to.

25 First, I don't know whether, quote, "the victim," end

1 quote, can really be a person who can really bring a qui tam
2 action. That is to say, is the person who is defrauded -- and
3 I'm using -- I understand the Defendants don't believe there
4 was any fraud, and so forth. So, but I'm using it in a -- as a
5 term of convenience.

6 The person who was the so-called victim of a fraud,
7 whether that's a person who is, quote, "a whistleblower," and
8 entitled to bring a qui tam action. If the answer is yes, I
9 would be surprised. I would be surprised if the answer is yes.
10 It could be.

11 But, I would think that almost, then, any victim who
12 alerts law enforcement that he or she is being victimized can
13 then bring a qui tam action, which I don't think is right. I
14 don't think that that's what the statute is designed. It's
15 designed as a whistleblower in the sense that it is a person
16 who is privy to -- and "privy" is a -- privy to the inside
17 workings of the company or entity or defendant who is actually
18 defrauding.

19 That is to say that person is, as a general rule, an
20 employee of the company who is -- of the wrongdoer who is
21 observing the wrongdoing.

22 So, I wonder whether some outside party who may be
23 the victim of a fraud can actually bring the qui tam action.
24 That is one general question.

25 The second general question I have is whether or not

1 this person could really be -- or any victim -- is the
2 so-called original source of the information. Since what he's
3 done in this case is simply -- and I'm not minimizing it, but
4 it's simply adding two and two, and saying, "Oh, it's five."
5 He's got the invoices and so forth, and he comes to the
6 conclusion that it's five. He then -- maybe he was right.
7 But, is that the original -- is that -- does he qualify then as
8 being a person with the original -- as an original source?

9 And, in particular, the *Biddle* case seems to address
10 that issue pretty conclusively.

11 A third issue is whether the Defendant's -- pardon
12 me, the Plaintiff's job responsibilities encompassed the duty
13 to disclose this information to his employer.

14 As I understand it, Mr. Prather was -- worked for the
15 Attorney General Spitzer. And his responsibilities were to --
16 and I'm going off the affidavit that was filed, he was at --
17 what is it, OCEF --

18 **MR. BALESTRIERE:** Organized Crime Task Force. OCTF,
19 Your Honor.

20 **THE COURT:** Right. The people -- and they were sort
21 of the end users of the product. "The product" being the
22 wiretaps. And, conducted by the Defendants. And they would
23 get the bills for this.

24 Okay. I think, though it's not clear, I don't know
25 whether -- I think he says at some point that he had the

1 obligation, the responsibility, of -- and here I'm going to be
2 inexact, and I'm not quite sure -- I think some precision is
3 probably required. But, I don't know whether he oversaw the
4 bills, approved the bills, reviewed the bills, authorized the
5 payments. It seemed to me he had some connection with the
6 bills.

7 And, why wouldn't it be his responsibility, if he
8 gets a bill, and gets other information, why wouldn't it be his
9 responsibility to report it to his employer? I don't
10 understand why it wouldn't be.

11 And it's not like he's just -- it's not like, "Gee,
12 you know, I get paper," or "I get a desk," or so forth, "and
13 maybe the price was fixed that I had to pay for the paper or
14 pay for the desk." He's in a position where he is reviewing
15 these invoices, these authorizations.

16 And, why isn't it his job to blow the whistle?
17 After all, if it's his job to blow the whistle, he doesn't get
18 a qui tam action. Because he's doing something, he's not
19 volunteering, not volun- -- he's not giving that information
20 from a voluntary point of view.

21 So anyway, I'm sure there are other concerns and so
22 forth, but those were the ones that struck me at the beginning.
23 And so, if you would like to address them, we have the time.

24 **MR. BALESTRIERE:** Thank you.

25 **MR. BLAVIN:** Your Honor, who would you like to hear

1 from first? Defendants or --

2 **THE COURT:** Pardon?

3 **MR. BLAVIN:** Who would you like to hear from first,
4 Your Honor?

5 **THE COURT:** I think the Plaintiffs would be --

6 **MR. BALESTRIERE:** So, in regards to the first point,
7 about whether --

8 (Reporter interruption)

9 **MR. BALESTRIERE:** -- with what you are calling a
10 victim, whether a victim can be a relator, a victim can.
11 There's the *Williams* case. It's an Eleventh Circuit, 1991
12 case.

13 And actually, I'll read from it. It says (As read):
14 "But Section 3730 cannot be used to prohibit
15 all government employees from bringing qui
16 tam actions simply because those actions are
17 based upon information acquired by the
18 government employee in the course of
19 government employment."

20 And that's what we have here. Mr. Prather, over the
21 course of 35 years, knows a lot about these wiretaps. When he
22 was at the Organized Crime Task Force is when he had the
23 ability to see that post-CALEA, post-1995, these wiretap
24 intercept charges went up dramatically. And that's how he came
25 in to the information.

1 Now, was it his job to blow the whistle, is what
2 you're saying. His job was to conduct organized crime
3 investigations. Under the New York Executive Law, he was
4 responsible for assisting other prosecutors and for bringing
5 organized crime cases when they were in several counties in New
6 York. The Organized Crime Task Force is kind of a weird animal
7 that way.

8 He was not charged with supervising whether vendors
9 were overcharging to OCTF or to the Attorney General's office.
10 And to the extent that he came into knowledge, he tried to get
11 government interest here. In 2004, he submitted to the FCC an
12 affidavit which Your Honor has in Mr. Blavin's declaration,
13 where he goes into extreme detail about the intercept
14 overcharges that he is seeing. For reasons which --

15 **THE COURT:** Oh, no, but that's not the issue. It's
16 not the issue that -- was he knowledgeable. The issue is did
17 he have a responsibility to disclose this information to his
18 employer.

19 **MR. BALESTRIERE:** But then --

20 **THE COURT:** You're saying he didn't.

21 **MR. BALESTRIERE:** But then, Your Honor, there is the
22 *Hagood*, the 1996 Ninth Circuit decision. Eventually that case
23 was dismissed on the second appeal, after summary judgment
24 regarding scienter. But the Ninth Circuit found in *Hagood* that
25 an individual who is an Army Corps of Engineer attorney -- so,

1 similar to Mr. Prather -- and had a specific responsibility
2 with regards to the contract in question could still be a
3 relator.

4 Your Honor referenced *Biddle*. *Biddle*, it was
5 different in that the --

6 **THE COURT:** Let's talk about *Hagood* for a minute,
7 because that was an opinion written by Judge Sneed.

8 **MR. BALESTRIERE:** Yes, Your Honor.

9 **THE COURT:** And Judge Kleinfeld wrote a concurring
10 opinion. And Judge Kleinfeld, of course, concurred in the
11 result. And then he's saying (As read):

12 "We err, I think, in deciding that *Hagood* was
13 an original source who voluntarily provided
14 the information. He was a lawyer charged
15 with the duty of drafting a contract and
16 other documents for the transaction at issue.
17 If he thought the transaction was fraudulent,
18 he was 'required to give an honest opinion'
19 to his client and 'may not knowingly assist a
20 client in criminal or fraudulent conduct.'"

21 And it went on to say:

22 "The issue here is distinct from whether a
23 government lawyer who discovers fraud in a
24 matter unrelated to his own duties can
25 recover in a qui tam action. Had Hagood

1 heard from a carpool acquaintance about a
2 fraud in some other agency, then the question
3 we left for another day in *Fine* would be
4 before us. But a lawyer working on a
5 transaction has a duty as an agent to
6 disclose to his principal 'information
7 relevant to matters within his province and
8 of which he should know the principal would
9 want to know.' Because Hagood provided the
10 information to his agency pursuant to his
11 legal duty, he did not do so voluntarily."

12 Now, that's a concurrence. But if that's the law, if
13 that were the law, you'd be out. Right?

14 **MR. BALESTRIERE:** No, Your Honor. And here's why.
15 Mr. Prather was not responsible for managing the transaction in
16 question. That's something that was separate. There was a lot
17 of debate in the early 2000s about this: How did the carriers,
18 the Defendants here, end up charging the law enforcement
19 agencies, and so forth.

20 But Mr. Prather, like a typical relator who is not an
21 insider -- because there are many cases where relators are not
22 actually insiders at the Defendant company -- saw the invoices.
23 He saw the false claims. And, that *Hagood*, as Your Honor said,
24 that's a concurrence anyway. But *Hagood* was responsible for
25 working on the actual Sonoma Valley agency transaction in

1 question.

2 But nonetheless, the Ninth Circuit, even there, said
3 that he -- the case should proceed.

4 **THE COURT:** I'm trying to find the affidavit.

5 **MR. BALESTRIERE:** Mr. Prather's affidavit?

6 **THE COURT:** Yes.

7 **MR. BALESTRIERE:** I can see if I can find that, as
8 well. But -- and then there is the -- the -- the *Williams*, the
9 1991 decision that I referenced, Your Honor.

10 With regards to *Biddle*, the Office of Naval Research
11 had some -- kind of like the *Hagood* concurrence rule, because
12 there you had an actual Naval attorney who was at Stanford who
13 is responsible for the specific transactions in question. And
14 there is language in that decision akin to that of Judge
15 Kleinfeld's. He had an obligation to report.

16 I mean, one thing to remember here is that
17 Mr. Prather did try to get government attention in this.

18 **THE COURT:** Well, what does that mean?

19 **MR. BALESTRIERE:** Well, I'm saying if the concern --
20 if the reason we have the rule is because we don't want someone
21 to hold onto the information and become a false claims
22 relator -- the 1995 *Fine* decision goes into this, in the
23 dissent, that -- what -- why we care about voluntariness. We
24 don't want someone to find out some bad information, not report
25 it to their superiors, hold onto it, quit, do whatever, and

1 then bring an action as a private citizen.

2 It's not what Mr. Prather did here. In 2004, he
3 raised this issue of concern to the Department of Justice, to
4 the FCC. And again, for reasons which are not clear, they did
5 not do anything about it. Because, as Mr. Prather pleads in
6 the filing eventually filed under seal in 2009, even at that
7 time, it was still going on. More than five years on. So,
8 under *Williams* and other decisions, a victim can be a false
9 claims relator.

10 And looking at *Biddle*, *Hagood*, and then the Eleventh
11 Circuit case, *Williams*, it certainly is possible even when you
12 are a lawyer -- *Williams* was a United States Air Force attorney
13 who the Eleventh Circuit said could have brought his claim,
14 even though there -- it's somewhat akin to *Hagood* -- he was the
15 attorney at the Air Force who learned about bid rigging when he
16 was working on contracts, there. So the policy rules and the
17 cases are clear that he could proceed.

18 And then, just finally, with regards to his job, his
19 job was not -- he wasn't an auditor. He did not negotiate
20 these transactions. The Defendants make a very big issue about
21 the fact that the very last line of his affidavit -- I can find
22 it when Counsel speaks -- he says that amongst the things he
23 investigated was fraud. And I think they underline it in their
24 initial papers. Organized crime, criminal fraud. Under the
25 Executive Law, he couldn't have even brought this case,

1 himself, if he wanted to.

2 **THE COURT:** Sorry, what?

3 **MR. BALESTRIERE:** I'm just saying that the Defendants
4 -- I think I'm responding to your last point, Your Honor. But
5 also, what the Defendants have said, that, well, it was his job
6 to investigate fraud. Not vendor fraud. They were supposed to
7 be working alongside with him. La Cosa Nostra and other kind
8 of organized crime fraud, that was what his job was to do.

9 He ended up seeing these invoices in the same way
10 that he saw the invoices for the lease of the Organized Crime
11 Task Force office, or payroll. He did not negotiate those; he
12 did not come up with those. But simply because he was the boss
13 at OCTF, he ended up seeing these invoices, just like the Air
14 Force attorney in *Williams* ended up knowing about the bid
15 rigging while he worked in the Air Force as an attorney.

16 **THE COURT:** So he had no duty to -- to report this to
17 the Attorney General?

18 **MR. BALESTRIERE:** Not in the respect of being a
19 relator. With regards to any duty he had --

20 **THE COURT:** I don't know quite -- whether he's a
21 relator not a relator, let me just ask you: Did he have a
22 duty? Did he have a duty to report this to the Attorney
23 General?

24 **MR. BALESTRIERE:** No. He did report it to the
25 Attorney General, because of the relationship he had with

1 Attorney General Spitzer. And as we see in the --

2 **THE COURT:** So if a person, a vendor says to -- to
3 the person who utilizes the service, "By the way, I just want
4 to tell you something, we're overcharging you for this, we're
5 overcharging you," your answer is that person who receives that
6 information has no duty to tell his employer that they're being
7 overcharged. That is your position.

8 Is that right?

9 **MR. BALESTRIERE:** I think it depends on their job. I
10 think --

11 **THE COURT:** Well, I'm telling you what his job is.
12 His job is that he's the one who authorizes the wiretap.
13 That's his job. He says it in his declaration.

14 **MR. BALESTRIERE:** Right.

15 **THE COURT:** Now, Verizon, Mr. Verizon goes and knocks
16 on Mr. Prather's door, and he says, "You're going to authorize
17 these wiretaps, these -- organized crime?"

18 "Yes."

19 "Well, I just want to tell you one thing. You're
20 being overcharged."

21 And your statement to me is he has no duty in
22 connection with his responsibilities to report that. Is that
23 correct?

24 **MR. BALESTRIERE:** No, Your Honor. I think, there --

25 **THE COURT:** Does he have a duty, or does he not have

1 a duty?

2 **MR. BALESTRIERE:** He did not have a duty to --

3 **THE COURT:** Pardon?

4 **MR. BALESTRIERE:** He did not have a duty to report
5 for the purposes of a subject matter jurisdiction analysis
6 under -- under what we're talking about here, the False Claims
7 Act. He maybe, I guess, had some kind of moral --

8 **THE COURT:** No, I don't care about morality. That's
9 not -- I'm not a Sunday school.

10 **MR. BALESTRIERE:** I understand, Your Honor.

11 **THE COURT:** I care about what the law is. And I'm
12 asking you, under the law, does he have a -- as his duties are
13 defined, if, in fact, he were told by the defrauder that they
14 were being defrauded, did he have a duty to report that to his
15 superiors?

16 And your answer is either yes or no.

17 **MR. BALESTRIERE:** No, under the False Claims Act. He
18 does not, there.

19 **THE COURT:** All right. Okay. All right.

20 **MR. BLAVIN:** Okay.

21 **THE COURT:** Let's hear from the defense.

22 **MR. BLAVIN:** Your Honor, with respect to your first
23 inquiry relating to the purpose of the original source
24 requirement, whether or not it is intended to allow the victims
25 of the alleged fraud to come forward and serve as qui tam

1 relators: The law is very clear within the Ninth Circuit, and
2 this Court recognized in the *Hansen* case, that the False Claims
3 Act is designed to encourage insiders to come forward with
4 genuinely valuable information that they otherwise would have
5 little incentive to do so. That is what this Court held in
6 *Hansen*, and it cited the *Alcon* decision from the Ninth Circuit
7 in support of that.

8 And the reason why original -- I'm sorry -- that
9 relators are typically insiders, that courts have found them to
10 be the paradigmatic insiders, is because they are close
11 observers of the fraud, or otherwise engaged in the fraudulent
12 activity, as the Third Circuit noticed in the *Stinson*
13 (Phonetic) decision. And that allows them to have --

14 **THE COURT:** Okay, so if Mr. Prather, rather than
15 working for the Attorney General, was working for Verizon, saw
16 these invoices and so forth, could he have then been the
17 relator?

18 **MR. BLAVIN:** Well, the --

19 **THE COURT:** Assuming all the other conditions, not
20 public, and blah, blah, blah, blah, blah. Would he be the
21 person that we're talking about as a legitimate relator?

22 **MR. BLAVIN:** It would have put him in a position such
23 that he may have been able to obtain direct and independent
24 knowledge of the fraud, which the statute requires.

25 **THE COURT:** So, you're saying that a person in

1 Mr. Prather's position can't be an original source.

2 **MR. BLAVIN:** There's no necessarily prophylactic rule
3 prohibiting government employees from being relators. But,
4 it's incredibly difficult. The burden upon them is high. As
5 the courts have recognized, outsiders generally have a much
6 higher burden to satisfy. To obtain direct and independent
7 knowledge, and to voluntarily provide such information to the
8 government.

9 Now, the mere fact that Mr. Prather had reviewed
10 certain invoices, for example, you know, we argue extensively
11 in our papers why that doesn't constitute any direct and
12 independent knowledge of fraud. If he was on the inside, he
13 may have gained some other piece of information which --

14 **THE COURT:** So you're saying on the outside, he still
15 could be a relator. But he would have the burden of showing
16 that he has -- that he's an original source.

17 **MR. BLAVIN:** That he's an original source, which
18 means that he has direct and independent knowledge of fraud,
19 which, typically, only insiders are able to obtain.

20 **THE COURT:** And what about his position? Does that
21 trouble you?

22 **MR. BLAVIN:** His position --

23 **THE COURT:** That he is working for the Attorney
24 General, which is -- which is -- and approving the wiretaps.

25 **MR. BLAVIN:** It troubles us greatly. And, I would

1 say that he has not met his burden of showing that he
2 voluntarily provided any such information to the government.

3 With respect to the 2004 FCC affidavits that
4 Mr. Prather submitted to the government, those were done in
5 support of the New York Attorney General's submission to the
6 Federal Communications Commission. He signed the affidavits in
7 his official capacity as the Deputy Attorney General.

8 He's listed as one of the authoring attorneys on the
9 New York Attorney General submission. All of the evidence that
10 he was collecting was used within the New York Attorney
11 General's comments to the FCC. This clearly fell within the
12 scope of his duties as a Deputy Attorney General for the State
13 of New York.

14 And, in those very FCC affidavits, Your Honor, which
15 are attached to the Blavin declaration at Exhibit 4 and
16 Exhibit 7, in Paragraph 20 of Exhibit 4, he specifically states
17 that at the OCTF, he and his office challenged the carriers for
18 what they viewed as exorbitant charges for implementing lawful
19 pen registration orders and eavesdropping warrants.

20 So the very claims that he's asserting here, he did
21 within his specific duties as a Deputy Attorney General. And
22 it was part of his job responsibilities.

23 The only evidence in the record with respect to the
24 relator at all voluntarily providing any such information to
25 the government are these affidavits which he clearly did within

1 the scope of his duties as a Deputy Attorney General.

2 Now, with respect to the *Hagood* decision, Your Honor,
3 which was raised earlier, there, the Ninth Circuit was very
4 clear at Page 1476, Note 19, that the Army Corps of Attorneys'
5 job was not to expose fraud, but to draft contracts and perform
6 other legal services. And here, the relator, himself, alleges
7 that part of his duties was to challenge the carriers for what
8 they viewed as exorbitant charges.

9 The only evidence providing such information to the
10 government are these FCC affidavits, which on their face were
11 done within his official paid capacities as a Deputy Attorney
12 General for the State of New York.

13 **MR. BALESTRIERE:** May I respond, Your Honor?

14 **THE COURT:** Sure.

15 **MR. BALESTRIERE:** The Defendant wants there to be a
16 rule that is equating this moral responsibility that Your Honor
17 was just referencing, to say, "Look, Mr. Prather was trying to
18 do the right thing here." I mean, there's no doubt about it.

19 But that is supposed to then mean that he cannot be a
20 false claims relator, and no government employee, contrary to
21 *Williams*, to *Hagood*, could ever be a false claims relator. If
22 they attempted to address the concern, it wasn't addressed.
23 And then they could not bring an action later on. That's the
24 rule that the Defendants want, which is not only contrary the
25 law, it's contrary to the perspective of what the False Claims

1 Act is supposed to be about.

2 And in the *Fine* decision, the dissent goes into how
3 limited voluntariness is supposed to be. Mind you that it is
4 in the dissent, as Your Honor was noting, with regards to the
5 concurrence previously.

6 But, we -- why do we have these rules? We don't want
7 a parasite. Despite the fact that, completely wrongly, the
8 Defendants call Mr. Prather a parasite here, he is not --

9 **THE COURT:** Forget the characterization.

10 **MR. BALESTRIERE:** Okay, but I'm saying he's not a
11 parasite. And then, that's what the original source --

12 **THE COURT:** I think the proper word probably would
13 have been "opportunist," not "parasite." That's really what --
14 they're saying he's an opportunist. He's taking advantage of
15 an opportunity that had been presented to him. Forget the
16 "parasite."

17 **MR. BALESTRIERE:** Well, I guess that meant every
18 false claims relator is an opportunist, if you want them to be.

19 **THE COURT:** I agree with that.

20 **MR. BALESTRIERE:** But what I'm saying here is that
21 they want a rule which will greatly restrict the ability of any
22 outsider -- which is not the law -- to be able to bring a false
23 claims act. I'm using the term "parasite" as do they, because
24 it's in the law.

25 I mean, there's a lot of Circuit Court decisions

1 which say they do not want parasitic actions, where someone
2 just found out through someone else. There's clearly direct
3 knowledge of the fraud here.

4 **THE COURT:** I'm not sure there's direct knowledge of
5 the fraud. I don't know. The direct knowledge of the fraud,
6 as I understand it, is based upon his experience of what things
7 should cost. I don't think that is direct knowledge of the
8 fraud.

9 **MR. BALESTRIERE:** If I may, Your Honor, that is
10 background that helped him realize by the --

11 **THE COURT:** What's the direct -- the direct knowledge
12 of the fraud is that he's reviewed invoices, and it was
13 inconsistent with his understanding as to what is a legitimate
14 cost for running a wiretap. That's what he's saying.

15 He's saying, "Hey, you know, let me tell you, I
16 know -- I know how this pie is made, and because I've made
17 these pies. And boy, that's the wrong..." Whatever.

18 **MR. BALESTRIERE:** No, I think you're right, though,
19 Your Honor. But that's -- that doesn't mean it isn't direct.
20 I mean, the term that is often used is that he receives his
21 knowledge unmediated by anything other than his labor.

22 He did not -- it's not like, say, the *Devlin* case
23 they rely on greatly, where there, the false claims relator
24 only learned about his information from a third party, heard it
25 somewhere else. Or Your Honor's decision in *Hansen* which

1 Counsel just referenced, where there, that relator found out
2 the information from other parties.

3 Mr. Prather, I mean, he's the --

4 **THE COURT:** So, I'm a contractor. I'm a contractor
5 working for the City, and I -- I get a bill from a builder
6 who's building me something. And it's for, you know, wood, at
7 \$12 a linear foot. And I know based, upon all of my
8 experience, it should cost \$3. Right?

9 He sends me the bill for \$12. I'm an original
10 source. Right?

11 **MR. BALESTRIERE:** You might be, but there's also more
12 here, Your Honor. Because he challenged the Defendants on why
13 they were charging so much, because he's somebody uniquely
14 situated to know what the prices were in the Eighties and
15 Nineties. And then he got different excuses, that they were --

16 **THE COURT:** Fine. I mean, that actually suggests
17 that he's an investigator conducting an investigation into the
18 matter. Which is entirely appropriate, by the way.

19 And, and, he's doing so, you're saying he's doing so
20 in his private capacity. Because he wants to blow the whistle
21 or he's doing so in connection with his responsibilities as an
22 employee of -- of Mr. Spitzer's office.

23 And, and then, what he finds, by the way, ends up in
24 affidavits that are submitted to the administrative body. I
25 mean, it suggests -- you're just making the case that this is

1 part of his official duties.

2 **MR. BALESTRIERE:** No, but --

3 **THE COURT:** That it was in the discharge of his
4 responsibilities that he did these things. It's not like he
5 was the Inspector General. It's not like he was the overseer
6 of costs.

7 But he came into -- he came -- he gathered
8 information, he was given information which was inconsistent
9 with information -- with his experience in the field. And came
10 to the conclusion that there was a fraud, and reported that to
11 the Attorney General and to other regulatory bodies.

12 That seems to be -- number one, it doesn't seem that
13 he's an original source. And number two, it seems to be well
14 within his responsibilities of Attorney General -- of an
15 employee of the Attorney General.

16 The question in my mind is whether I can really
17 decide this on the papers as it is now, or whether I should
18 allow some discovery on the issues of -- limited to the issues
19 of his job -- his responsibilities, his job, what he did at his
20 job, and what his responsibilities were. And, and how he
21 gained his information which he claims was the basis of being
22 an original source.

23 And, I can see allowing discovery in those two areas,
24 and then having a motion for partial summary judgment on those
25 issues. Because if you're -- I don't need to go into whether

1 he was right or wrong. I mean, whether they were defrauding
2 with particularity or so forth, I don't need any of that now.
3 I need to figure out: Does he stand in the position, can he
4 stand in the position of a relator, as that is defined in qui
5 tam actions.

6 And I think what I want to do is allow the parties to
7 conduct -- allow the parties to conduct discovery. I don't
8 know whether the best thing is to have you amend your complaint
9 or not.

10 **MR. BALESTRIERE:** Maybe we could wait until after --
11 certainly 12(b)(1), the law -- Your Honor can do exactly what
12 you are suggesting. We could have -- because it's subject
13 matter jurisdiction, we have to show by a preponderance of the
14 evidence.

15 While generally it's documentary, and there's law
16 that says we can have more, we can have a hearing or something
17 like that. So, certainly, it's permissible. And we could work
18 it out with the Defendants.

19 And as Your Honor is saying, then we could decide
20 whether or not we need to address 12(b)(6), (9)(b) issues.

21 **THE COURT:** Probably that is a good way of doing
22 that.

23 **MR. BLAVIN:** Your Honor, just to address that point,
24 as Counsel notes, this is an evidentiary motion. The burden
25 has shifted to them to come forward with a preponderance of the

1 evidence, to demonstrate that the relator, in fact, is an
2 original source. They had nearly six weeks to do so.

3 **THE COURT:** Well, I'm going to allow them more time.
4 Okay, be that as it may.

5 **MR. BLAVIN:** All right. And Your Honor, frankly,
6 discovery is not going to reveal much of anything.

7 **THE COURT:** Well who knows? Who knows? Who knows?
8 Discovery is wonderful. I don't do it; it's wonderful. Okay.

9 **MR. BLAVIN:** Well, with respect to the specific
10 sources that the relator identifies in the complaint as to
11 whether or not he has direct knowledge from them, based upon
12 the documents, themselves, that are in front of the Court right
13 now, it is facially clear that the relator --

14 **THE COURT:** I think the way to proceed is I'm going
15 to allow you to amend your complaint. You amend your
16 complaint, then I'll allow discovery on -- on those issues that
17 I've identified, and only those issues that I've identified.
18 And then, we will see whether or not you believe that you have
19 enough to make a motion.

20 Yes.

21 **MR. AXEL:** Yes, Your Honor. Douglas Axel on behalf
22 of AT&T. And, the Court has been addressing, of course, the
23 public disclosure bar, which is jurisdictional. And I
24 understand that as far as the Court's view as to discovery as
25 to AT&T and Qwest, we made a separate filing just to point out

1 that under 9(b), which I think all the Defendants have an
2 argument, he doesn't allege anything at all with respect to our
3 client.

4 And so, before we go down the road into discovery, I
5 would certainly urge the Court to grant the dismissal also on
6 the alternative grounds. Both the 12(b)(6), there's no claim
7 alleged. And under 9(b), he doesn't allege at all what our
8 Defendant has done.

9 And if he meets those burdens, then, then they
10 confront the discovery on the public disclosure model.

11 **THE COURT:** So they want to be included out.

12 **MR. BALESTRIERE:** Yeah. I do not want them included
13 out, but we can -- and here's why. To the extent that there
14 are concerns, we can address those. That, we can address very
15 easily in a repleading, and with more reference to documents.

16 **THE COURT:** Granting the motion with leave to amend.
17 There you go.

18 **MR. BLAVIN:** Your Honor, if I could quickly address
19 one point with respect to the leave-to-amend issue.

20 The Ninth Circuit has made clear in the *Marongo*
21 decision that leave to amend is improper on a jurisdictional
22 motion, where the defect is one of substance.

23 And in that case, the Court noted (As read):

24 "If jurisdiction is lacking at the outset,

25 the district court has no power to do

1 anything with the case except..."

2 **THE COURT:** Okay. I'm granting the motion with leave
3 to amend. If I'm wrong, you can submit -- Seventh and Mission.
4 That's where your recourse is.

5 But I think that it's appropriate in this case to
6 allow the Plaintiff leave to amend, put everything in that he
7 believes identifies his duties, and why this wasn't within his
8 duties, and why it was not publicly-released information or
9 public disclosure. And then I'll entertain the motion.

10 **MR. BALESTRIERE:** Thank Your Honor. Should I --
11 should we -- do you want to assign four weeks for us to get
12 that in? Or should I just work it out --

13 **THE COURT:** Work it out with the Defendants.

14 **MR. BALESTRIERE:** Okay.

15 **THE COURT:** And finally, why the -- why our fine
16 friends here should be included in the complaint.

17 **MR. BALESTRIERE:** Yes, Your Honor.

18 **THE COURT:** Who are you?

19 **MR. AXEL:** AT&T, Your Honor.

20 **THE COURT:** AT&T.

21 **MR. AXEL:** And I believe --

22 **THE COURT:** And Qwest?

23 **MR. TAYLOR:** And Qwest, Your Honor.

24 **THE COURT:** And Qwest.

25 **MR. BARNIDGE:** And Sprint, Your Honor. The specific

1 allegations made to Sprint don't go to a state claim, in any
2 event. So, I think we're all in a similar situation.

3 **THE COURT:** One more shot.

4 **MR. BALESTRIERE:** I understand my obligation with
5 regard to those Defendants, Your Honor.

6 **THE COURT:** Okay.

7 **MR. AXEL:** And so, is the Court contemplating
8 there'll be an amendment?

9 **THE COURT:** Yes. There will be an amendment, and
10 then there'll be discovery. And then I'll see you all back
11 here.

12 **MR. AXEL:** Your Honor, will we be able to bring a
13 motion? I mean, if he's not meeting his allegation burdens
14 under 9(b) --

15 **THE COURT:** You'll be able to bring any motion you
16 want to bring.

17 **MR. AXEL:** Prior to discovery.

18 **THE COURT:** No, no, no. Let's get it -- I don't want
19 to piecemeal this anymore. I want to give everybody one more
20 shot.

21 **MR. BLAVIN:** And discovery, Your Honor, is limited to
22 the jurisdictional issue?

23 **THE COURT:** That's right. A few more hours.

24 **MR. AXEL:** Very well, Your Honor.

25 **THE COURT:** Put it on the bill. Thank you,

1 everybody.

2 **MR. BALESTRIERE:** Thank you, Your Honor.

3 **MR. BLAVIN:** Thank you, Your Honor.

4 **THE COURT:** (Inaudible)

5 **MR. BALESTRIERE:** Thank you.

6 (Conclusion of Proceedings)

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CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in No. C 09-2457 CRB, United States of America ex rel. John C. Prather, et al. v. AT&T, et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

_____/s/ Belle Ball_____

Belle Ball, CSR 8785, RMR, CRR

Tuesday, May 1, 2012